U.S. Department of Labor Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: December 8, 1997

Case No.: 96-INA-00202

In the Matter of:

DOOSAN FOODS CO.,
Employer

On Behalf Of:

CHOON HWA SONG KIM
Alien

Appearance: Timothy K. Seo, Esq.
For the Employer/Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On January 13, 1995, Doosan Foods Company ("Employer") filed an application for labor certification to enable Choon Hwa Song Kim ("Alien") to fill the position of Korean Foods Maker (AF 132-133). The position was classified as that of Kettle Cook as described in the *Dictionary of Occupational Titles.*[2] The job duties for the position are:

> Preparation of ingredients and sauces for Korean prepared dishes such as various kinds of Kimchi and Mitban-Chan such as Ojing A Mutchim (seasoned and preserved squid), Maeruchi-Bokkum (seasoned and preserved anchovy), Moomal-Maeng (seasoned dried radish), Manul Jang A Chi (seasoned Garlic), Kongja-Ban (seasoned and preserved soy beans), etc. for wholesale to grocery stores.
>
> The only requirement for the position is two years of experience in the job offered.

The CO issued a Notice of Findings on October 30, 1995 (AF 106-108), proposing to deny certification on the grounds that the Employer is offering the job with unduly restrictive requirements. Specifically, the CO found that the Employer's requirement that applicants have two years of experience as a Korean food maker is not normal for the position. Accordingly, the CO instructed the Employer to document the business necessity of the requirement in accordance with § 656.21(b)(2)(i). In addition, the CO questioned whether the job opportunity is being described with an employer preference pursuant to § 656.21(b)(2)(v), and whether the requirements for the job opportunity represent the Employer's actual minimum requirements under § 656.21(b)(5). Finally, the CO questioned whether the job opportunity is clearly open to any qualified U.S. worker.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

[2] 526.381-026 COOK, KETTLE (beverage; can. & preserv.; grain-feed mills) alternate titles: cook; cooker; cook, pressure Cooks fruits, vegetables, meats, condiments, or fish products, preparatory to canning or extraction of byproducts, using cooking equipment: Weighs or measures ingredients according to recipe, using scale or graduated container. Loads ingredients into kettle or pressure cooker. Observes thermometer and gauges, turns valve to admit steam to pressure cookers or lights gas burner to heat and cook contents of kettles. Stirs mixture in kettle to blend and prevent scorching of contents, using hand or power-driven paddles. Observes cooking process or tests batch liquor with viscosimeter or hydrometer to verify viscosity or specific gravity and to ascertain completeness of cooking process. Starts pump, opens valve, or tilts or scoops contents of kettle into container to unload cooked contents. May test batch for sugar content, using refractometer. May mix ingredients prior to cooking. May be designated according to material cooked as Cook, Fish Eggs (can. & preserv.); Cook, Fruit (can. & preserv.); Cook, Jelly (can. & preserv.); Cook, Juice (can. & preserv.); Cook, Sauce (can. & preserv.); Cook, Starch (can.

Accordingly, the Employer was notified that it had until December 4, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated November 30, 1995 (AF 33-106), the Employer contended that it does not keep inventory records. To support this contention, a statement from the Employer's accountant was submitted. In addition, the Employer submitted numerous copies of sales and purchase records. The Employer further stated that it does not use written recipes as its employees are expected to have food-making experience before they begin working.

The CO issued the Final Determination on January 16, 1996 (AF 30-32), denying certification because the Employer failed to establish the business necessity of its experience requirement.

On February 14, 1996, the Employer requested review of the denial of labor certification (AF 1-29). The CO denied reconsideration and on March 5, 1996, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc)*. Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

The Board defined how an employer can show "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc)*. The *Information Industries* standard requires that the employer show the following: (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and, (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige & Associates,* 91-INA-72 (Feb. 3, 1993); *Shaolin Buddhist Mediation Center,* 90-INA-395 (June 30, 1992).

In the instant case, the CO found that the requirement that applicants have two years of experience as a Korean food maker is unduly restrictive as it is not a normal requirement for similar jobs in the United States (AF 107). Therefore, the CO instructed the Employer that it must document the business necessity for the requirement. The CO asked the Employer to submit documentation which establishes that a person with a general knowledge of cooking could not prepare the food items by reading and applying the direction of recipes (AF 108). Specifically, the

CO requested that the Employer submit recipes for the items that the individual filling the position would be required to prepare.

In rebuttal, the Employer stated that it does not have published recipes for the various food items that it manufactures (AF 105). He explained that the food makers are expected to be familiar with the look and taste of Korean food and must be experienced with the preparation of these foods at the time that they begin working.[3]

We emphasize that it is the Employer's burden to establish the business necessity of its requirements. Although a written assertion constitutes documentation that must be considered under *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc)*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. For example, *Inter-World Immigration Service,* 88-INA-490 (Sept. 1, 1989) (citing *Tri-P's Corp.*, 88-INA-686 (Feb. 17, 1989)) found that unsupported conclusions (*i.e.*, statements without explanation or factual support) are insufficient to demonstrate that certain job requirements are normal for a position or supported by a business necessity. In this case, the Employer has only stated that the food makers are expected to be familiar with the look and taste of Korean food and must be experienced with the preparation of these foods at the time of hire. Based on the foregoing, we find that the Employer's rebuttal is insufficient to establish the business necessity of its requirement. Although we do not doubt that specific experience as a Korean food maker prior to the time of hire would certainly enhance the Employer's business, we note that merely enhancing the business is insufficient to show that there is a business necessity for this requirement. See *Phyllis Kind Gallery, Inc.*, 92-INA-423 (Oct. 11, 1994); *Broman Travco International, Inc.*, 90-INA-388 (May 21, 1992); *Midtown Legal Bureau, P.C.*, 92-INA-35 (Dec. 23, 1992).

As such, the Employer has not met its burden of establishing the business necessity of its experience requirement. We find that the Employer's experience requirement is a preference as opposed to a business necessity. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

[3] We note that the Employer submitted additional documentation with its request for review (AF 1-29). However, it is well settled that evidence first submitted with the request for review will not be considered by the Board. *Cappriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Kelper International Corp.*, 90-INA-191 (May 20, 1991); *Kogan & Moore Architects, Inc.*, 90-INA-466 (May 10, 1991). The CO clearly presented the issues in the NOF and the Employer had every opportunity to present all relevant evidence in his rebuttal.

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.